Colden Hills, Inc. *and* International Association of Heat and Frost Insulators and Asbestos Workers, Local 30. Case 3–CA–22657

May 28, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND BARTLETT

On July 26, 2001, Administrative Law Judge Eric M. Fine issued the attached decision. The Respondent filed exceptions, and the General Counsel filed cross-exceptions and a supporting brief, as well as an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[1]

1. The judge found that the Respondent violated Section 8(a)(1) of the Act in two instances. The judge cited two statements by the Respondent's vice president, Patricia Kester. Kester told union applicant Brian Urquhart that she presumed that, as a union worker, he could not work for the Respondent because he could not work for a nonunion company. Kester also told Urquhart that the Respondent did not take his application seriously because he was a union organizer. In addition, the judge found that the Respondent violated Section 8(a)(3) and (1) of the Act because the Respondent refused to consider Urquhart for hire and refused to hire him.

We agree with the judge, for the reasons he states, in all respects except one. We disagree with the judge's finding that Kester's first cited statement violated Section 8(a)(1) of the Act. Urquhart asked Kester whether it made a difference to her that, "I'm union and you're not union." In response Kester said to Urquhart

> I don't think that if you were a regular union worker that you'd even be able to work for our firm, 'cause usually, you're union, you can't work . . . for a company that's not union, from what I understand. Some people who have come here and applied for jobs in the past, if they've been union, found out that we weren't union, they weren't even able to consider us as employment.

We do not find that this statement is coercive. Taken in its factual context, Kester's statement conveys her belief that union rules, rather than employer action, precluded Urquhart's employment with the Respondent. Accordingly, we find no violation of Section 8(a)(1) of the Act in Kester's cited statement.[2]

2. The General Counsel, in cross-exceptions, requested that the Respondent be required to reimburse Urquhart "for any extra Federal and/or state income taxes resulting from the lump sum payment of the backpay award." We decline to order this relief at this time. Such remedial relief sought by the General Counsel would involve a change in Board law. See, e.g., *Hendrickson Bros.*, 272 NLRB 438, 440 (1985), enfd. 762 F.2d 990 (2d Cir. 1985). We do not think it is appropriate, at this time, to consider such a change in Board law in the absence of a full briefing by the parties. See *Kloepfers Floor Covering, Inc.*, 330 NLRB 811 fn. 1; *Ishikawa Gasket*, supra, slip op. at 2; *Cannon Valley Woodwork*, 333 NLRB No. 97 fn. 3 (2001).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Colden Hills, Inc., Buffalo, New York, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Delete paragraph 1(a) and reletter the subsequent paragraphs.

2. Substitute the following for paragraph 2(d).

"Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

3. Substitute the attached notice for that of the administrative law judge.

[1] We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001). We shall substitute a new notice in accordance with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

[2] *Arlington Electric*, 332 NLRB 845 (2000), relied on by the judge is factually distinguishable. There, the employer interrogated the employee about his union activity and the questioning of the employee "implied that he should not be working for the Respondent." Supra. Here, Kester's response to a point raised by Urquhart had no such implication.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT inform job applicants that their employment applications are not taken seriously because they are union organizers.

WE WILL NOT refuse to consider for employment or refuse to hire job applicants because of their membership in or activities on behalf of the International Association of Heat and Frost Insulators and Asbestos Workers, Local 30, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Bryan Urquhart employment in the position to which he sought to apply, without prejudice to his seniority, or other rights or privileges, and to which he would have been entitled absent the discrimination against him.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to employ Bryan Urquhart and, within 3 days thereafter, notify him in writing that this has been done and that this personnel action will not be used against him in any way.

WE WILL make Bryan Urquhart whole for any loss of earnings he may have suffered by reason of the discrimination against him plus interest.

COLDEN HILLS, INC.

Ron Scott, Esq. and *Greg Lehmann, Esq.*, for the General Counsel.

Earl Kester, President of Colden Hills, Inc., of Buffalo, New York, for the Respondent.

Brian Urquhart, Organizer, International Association of Heat and Frost Insulators and Asbestos Workers, Local 30, of Rochester, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ERIC M. FINE, Administrative Law Judge. This case was tried in Buffalo, New York, on April 23, 2001. The charge was filed by the International Association of Heat and Frost Insulators and Asbestos Workers, Local 30 (the Union). The complaint alleges that Colden Hills Inc. (Respondent), violated Section 8(a)(3) and (1) of the Act since about February 17, 2000, by refusing to consider for hire and refusing to hire Brian Urquhart because of his membership in and activities on behalf of the Union.[1]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, has been an industrial insulation contractor in the building and construction industry at its facility in Buffalo, New York, where it annually provides services valued in excess of $50,000 to customers located outside the State of New York. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent admits that A. Earl Kester (E. Kester), its president, and his wife Patricia Kester (P. Kester), its vice president, are statutory supervisors. P. Kester and alleged discriminatee Brian Urquhart, an organizer employed by the Union, were the only witnesses who testified during this proceeding.

Urquhart began working for the Union in 1994, and his duties as an organizer include making application for employment with nonunion employers in an effort to organize their employees. Urquhart is an experienced pipe cutter and pipe insulator. He underwent a 4year apprenticeship training in the early 1980s. During that time and until his employment with the Union began, Urquhart worked for various insulation contractors.

Urquhart learned of Respondent in January by contacting the New York State Unemployment Office where he was seeking job listings in the pipe insulation field. Urquhart phoned Respondent and arranged an employment interview, which took place on February 17, at which time he met with P. Kester at Respondent's facility. Urquhart filled out Respondent's employment application on February 17; wherein he stated that he was applying for the position of "insulator trainee," that he could start any time, and under salary desired he listed "Any." Under former employers on the application, Urquhart listed one company where he worked as an insulator from 1980 to 1984 and was earning $7.16 an hour, the next company from 1984 to 1992 where he worked as a insulator and was earning $18.73 an

[1] All dates are in 2000, unless otherwise indicated.

hour, and he listed the Union as his current employer for the position of "organizer" for which he was earning $20.44 an hour.

Urquhart, unbeknownst to P. Kester, taped their conversation during his February 17 interview.[2] The transcript of the tape recording reveals the following: Urquhart told P. Kester that he had prior experience in commercial and industrial insulation and in pipe covering work. P. Kester asked him if the difference in pay between his $18.73 an hour job, and his $7.16 an hour job was due to the fact that one was a union contractor, and he responded, "you could say that." P. Kester responded, "Well, we are not a union contractor." P. Kester told Urquhart that she was conducting the interview, which would normally be done by her husband because E. Kester was out of town. P. Kester stated that they usually start people off at $6 an hour for a 30-day period to assess their skill level, although this could change since Urquhart had insulation experience. Urquhart responded, "that's not a problem." P. Kester stated that, "I'm going to put down here that it's been explained to you and have you initial it a little later on."[3]

The tape transcript reveals that: P. Kester then asked Urquhart if he was working and if he was looking for a job immediately. Urquhart stated that, "I'm working, but I can take the job." Urquhart told her that he was working for Local 30. When she asked why he wanted to leave, Urquhart stated that he was not going to leave them. He explained, "This is my job; I'm an organizer." He stated, "I go to work for the contractors, do a good day's work, . . . and show them the Union way." Urquhart stated that he was looking to bring both employees and the contractor into the Union. P. Kester stated in response to this remark that Urquhart would have to speak to her husband. P. Kester stated that she was sure that Urquhart knew about traveling to out of town job locations and he agreed. She also told him, "No wonder that you were willing to travel, no matter how far," . . . "to go and fill out an application."

The tape transcript reveals that: P. Kester stated that her husband used to be a member of the Oil and Chemical Workers Union, and that one of the cons of union employment was that their high wages chased them out of the Buffalo area. Urquhart responded that they have to make everyone union, that it's a tight market, and that they helped out the contractors. The conversation continued and the tape transcript reflects that following exchange occurred:

> MR. URQUHART: You bet. That doesn't make it—that doesn't make a difference to you, does it, that I'm union and you're not union?
>
> MS. KESTER: Well, I don't think that if you were a regular union worker that you'd even be able to work for our firm, 'cause usually, you're union, you can't work—
>
> MR. URQUHART: No.
>
> MS. KESTER: —for a company that's not union, from what I understand. Some people who have come here and applied for jobs in the past, if they've been union, found out that we weren't union, they weren't even able to consider us as employment.
>
> MR. URQUHART: No, we can consider you, I was just wondering if you had a policy of not hiring-
>
> MS. KESTER: No, no, I don't myself, my main thing is, why would somebody come in here if they have been a union insulator, they haven't able to, they said that they can't work for somebody that's not union.
>
> MR. URQUHART: Oh, we can, as long as we, we're working for the union.
>
> MS. KESTER: As long as you're working for the union? (Laughs) Oh, that's (inaudible)
>
> MR. URQUHART: No, we can't come over here to work for ourselves.
>
> MS. KESTER: No, we don't have a particular policy against or for, or for or against hiring anybody who's able to do the work and do the things that are required by our company" going out of town—
>
> MR. URQUHART: Yeah, we don't have a problem with that we're used to construction.

The conversation continued and P. Kester stated that she was going to refer the application to her husband and tell him "what you're all about, basically, is to promote the union . . . to let everybody know what the union can do for them." Urquhart stated that, "We'll go to work and do our best day's work, you know and show you what we can do." Urquhart explained the training requirements for union workers, and at P. Kester's request, he told P. Kester that in the Rochester and the Syracuse area union workers start at $10 an hour plus benefits.

On completion of the interview, Urquhart left the building but returned within about 5 minutes to pick up a copy of his application. Urquhart was given a copy of the application and in the remarks section, P. Kester had written the words, "Union organizer."[4]

On July 24, Respondent ran an ad in the Buffalo News advertising for insulators. The ad stated no experience necessary, but the applicant needed a car and a driver's license. The ad listed Respondent's phone number. Urquhart learned of the ad and having not heard from Respondent since his February 17

[2] At the hearing, counsel for the General Counsel sought to introduce into evidence the tape recordings of the February 17 interview and of a July 28 phone conversation between Urquhart and P. Kester that Urquhart also secretly recorded. At the end of the hearing, I made provision for the General Counsel to make a transcript of the tape recordings, to provide copies of the transcript to Respondent, to play the tapes for Respondent, and to attempt to reach a stipulation with the parties as to the accuracy of the transcripts on review of the tapes. Thereafter, counsel for the General Counsel by cover letter dated May 1, 2001, moved to submit into evidence transcripts of both conversations along with a written stipulation signed by all parties reflecting that the parties agreed to the accuracy of the transcripts. By order dated May 15, 2001, I admitted the transcripts and the accompanying stipulation into evidence as Jt. Exh. 1. I also admitted into evidence GC Exhs. 15, 16, and 17, copies of the tape recordings on which the transcripts were based. By that same order, which I admit into evidence as ALJ Exh. I, I closed the record to this proceeding.

[3] P. Kester wrote *6oo* signifying $6 an hour under salary desired on the application next to where Urquhart had written "Any."

[4] Urquhart phoned the Respondent on February 18, and stated that he had incorrectly listed on the application that he was not a U.S. citizen. The application reflects that the receiver of the call corrected the application and listed him as a citizen.

meeting with P. Kester, Urquhart phoned Respondent on July 28. He spoke to P. Kester and, as set forth above, he secretly recorded their phone conversation. The transcript of the tape reflects that: Urquhart told P. Kester that he had applied on February 17. P. Kester told Urquhart that she was looking for his application "cause we have another ad in the paper and we are doing another batch of hiring . . . ." When she located the application, P. Kester told Urquhart that she was the one who usually conducted the interviews and that questions she normally asked that were listed on the application were not answered. Urquhart responded that P. Kester did interview him the day he filed the application. P. Kester, on further review of the application, stated, "I see what's going on here, you . . . were the union organizer that came in." P. Kester told Urquhart that he needed to speak to her husband, "if anything" and that her husband was out. Urquhart stated that he was just looking for a pipe covering job. P. Kester stated that her husband was reviewing all of the applications, and that she would place Urquhart's application with the ones that they were accepting during that time period. Urquhart asked and P. Kester stated that they had hired people since February 17, that they had let a couple of people go, and that they were trying to hire again to replace the people who did not work out. Urquhart asked if there was any reason that he did not get a call and the tape transcript reflects that P. Kester replied:

> no particular reason whatsoever. I don't know whether I took you altogether serious that you were really wanting a job, or whether you were just here as a union organizer, um, you know, or what. And I told you that, based on that, your best person that you'd want to go through your interview with would be Mr. Kester. And he has been hectic . . .

The transcript reflects that P. Kester stated that she had not recorded certain information from Urquhart during the February 17 interview and during the July 28 phone conversation Urquhart answered affirmatively to her questions that he had a vehicle, that he could read a ruler, that he could go out of town on job assignments, and that he was not afraid of heights. P. Kester stated that those are the four questions she always asked, but she did not know why she failed to ask them of Urquhart during their initial interview. Urquhart reiterated during the call that he could start at $6 an hour. P. Kester stated during the call that, "We are doing hiring at the present time, again; we do, we take in a lot of applications and we go through them, and then we hire, attempt to train, and if the people don't work out, we let them go and hire some more."

Urquhart hand delivered the unfair labor practice charge to the Respondent's facility on August 17. He credibly testified that he had a brief conversation with P. Kester at that time, during which he asked her why he had not been hired. P. Kester responded, "no particular reason." Urquhart credibly testified that he was never offered a job with Respondent.[5]

[5] P. Kester testified at the hearing that she had a slight recollection that she tried to call Urquhart at one of the phone numbers listed on his application after Urquhart's phone call asking about his application. She testified that she did not know what she was going to say to Urquhart, that she was not able to get through to Urquhart, but that she left a message. I do not credit her claim that she left Urquhart a message. In view of Urquhart's repeated efforts to obtain employment with Respondent had a message been left for him, I believe that he would have responded to it.

A. P. Kester's testimony and Respondent's defense

Based on considerations of demeanor and the record as a whole, I did not consider P. Kester to be a credible witness. P. Kester's testimony vacillated at the hearing. Moreover, her testimony at the hearing as well as that contained in a sworn statement submitted to the Region during its investigation was undercut by the tape recording transcripts. P. Kester appeared to be an intelligent individual, and her claim during her testimony at the hearing that she did not know that Urquhart was a union organizer employed by the Union does not withstand scrutiny. Particularly, since the tape transcript reveals that he told her that he could work for Respondent as long as he worked for the Union and that she repeated it back to him.

P. Kester submitted a notarized typewritten statement to the Region dated August 30. She stated therein that when Urquhart placed the call to her after his February 17 interview, she again reviewed his application and that she still felt that he was overqualified, and that he would not be happy accepting a job for $6 an hour when he had been earning $20.44 an hour. She testified in the statement that she also considered the distance of his commute, which would cut into his pay of $6 an hour at Respondent. P. Kester testified in the statement that it had been her experience that a man in these circumstances never lasted, and that Respondent's training time is wasted. P. Kester went on to state in the notarized statement that:

> It wasn't until his short visit again on Aug. 17, 2000, to our business location . . . that he made it clear to me that he wouldn't be leaving his presently held job to work for us. That he'd be "very happy" to work for us at any wages because as he put it, "that was his job, to get a job working for us."

This assertion in P. Kester's notarized statement is clearly untrue, for the transcript of the February 17 interview reveals that during the interview Urquhart told P. Kester that he was employed by the Union, that he would not be leaving the Union to work for Respondent, that he agreed to work for Respondent for $6 an hour, and that it was his job as an organizer to go to work for contractors, to put in a good day's work to show them the union way. Urquhart's application also stated that he was willing to work for any wage.

P. Kester testified, at the hearing, that on taking applications she is looking for someone who: has a vehicle; could travel and work for Respondent's wages; and who does not live too far from Respondent. P. Kester testified that there have been times when applicants have learned that Respondent is a nonunion shop and have stated that they were union and could not work for a nonunion company. She testified that when she saw on Urquhart's application that he was working for a worker's local she thought that he was working for a union company. P. Kester then testified that she asked Urquhart if he worked for a union company, and he said he did. P. Kester testified that she said something like "I don't even think you can work for our company because our company is a nonunion plant." Urquhart replied that he could. Kester went on to testify as follows:

> And I said well, something to the effect of that I didn't understand it, and I was always of the understanding if you had a union card, you couldn't work for a nonunion plant. I based that upon just general information because my son works for a union company, and Mr. Kester, many years ago, had been involved in a union. So based on that knowledge, I don't think we went much further. And I told him based on the fact that I was confused, or I don't know if I used those words, but I didn't really understand this theory that he could work for us and hold a union card that he would have to speak with Mr. Kester at that point because I didn't understand that.
>
> JUDGE FINE: Is that why you didn't fill in those four questions at the bottom of the application?
>
> THE WITNESS: Yes. I don't even recall—during his interview or during his testimony he indicated that we talked a little bit about those things, and maybe we did, but that's probably why because I felt that he would not be necessarily a good applicant for us. And in some cases, I didn't fill out the bottom if I got that impression early.
>
> JUDGE FINE: Right.
>
> THE WITNESS: If I got the impression that they were overqualified or that the money that they were making was not comparable to what they could ever work for us for, that they wouldn't be happy, or our time training would be—and I think I might have even mentioned to him—the difference between the $7 and things is that he wasn't with a union company here and he was with a union company here. So that I might have mentioned to him, but I was never aware that this Worker's Local 30 was a union or that he was an organizer with the union. I think I even saw the word organizer, but I didn't know what that meant. I didn't know organizer meant that he was going to organize a union in our company. That he just organizes.

However, P. Kester then contradicted the forgoing testimony. She testified that she wrote "union organizer" on Urquhart's application because, "I was trying to tell Mr. Kester because he looked at this application is that this man worked for a union, and that his description of his position was organizer, and he knew what that meant. I didn't." P. Kester then changed her testimony to again claim that, "I don't think he ever made it clear to me that he was a—that he actually was working—that he was the union. I just thought he worked for a company that was unionized, and therefore, why would he work for our company."

P. Kester testified that the same day of Urquhart's interview, she added to the application after the term union organizer, "you'd need to speak to him regarding a job here. My opinion is that he'll not be happy here, he's over qualified." P. Kester initially testified that she spoke to E. Kester briefly about Urquhart's application probably around the end of the week Urquhart applied, if E. Kester came back in town at that time. P. Kester then changed her testimony stating that she did not think that she spoke her husband about the application until after Urquhart's July 28 phone call with her. P. Kester went on to testify as follows:

> Q. Well, I'm just asking what the conversation about this gentleman was.
>
> A. I believe it was just to tell him that this fellow had called back again looking for employment, and that he wanted to know why he had not been hired when he wanted to talk to him.
>
> Q. And did Mr. Kester ask you any questions about him, or what did he say?
>
> A. No, he just said that well, at that particular time, he said that he just wasn't interested in hiring anybody right now that had this kind of experience, that we were looking for just trainees. And according to his application, that the money he had made and everything that he probably would not work out for our firm. And I don't believe he called him. I don't know for a fact.

However, P. Kester testified that after Urquhart had applied, Respondent did in fact hire someone with experience. She testified that they hired an individual named Steven Taylor because he had the ability to lead a second crew in addition to the one lead by E. Kester. Taylor's employment records with Respondent revealed that he was hired for $9.50 an hour, and that he worked from October 23 to November 15. Taylor's employment application showed that he was working for another company as a forklift operator for a period of less than 2 months at the time Respondent hired him, and that he was earning $6.75 an hour. Taylor's reason for leaving that employer was its low wages. Taylor's prior job was as a carpenter for a construction company for which he also worked less than 2 months. Taylor put under reason for leaving "Fired" on his application. Taylor was earning $12 an hour for this company. P. Kester testified that Taylor lived a little distance away from Respondent and that they made several exceptions in hiring him because they needed someone with experience. She testified that Taylor left due to the distance of his commute.

Respondent faxed a list to the Region on November 30, revealing that it had hired 18 insulation employees between March 31 and November 22, 2000, and that all of those employees with the exception of the one hired on November 22 had left Respondent's employ at the time it formulated the list. The November 30 list, as supplemented by an updated list as well as payroll records, revealed that each of the 18 employees on the list worked for the Respondent for less than 2-1/2 months.[6] In fact, five people had been hired by Respondent and left its employ between the time of Urquhart's February 17 application and his July 28 phone call. A sixth individual was hired on June 22 and left on August 4. This pattern continued toward the end the year 2000 through April 2001, the time of the hearing, as Respondent's records reveal that during this time it hired 10 more insulation employees with most working for Respondent only a few days, others lasting a few weeks, and one Raymond McCool, who was hired at $7 an hour, but

[6] Payroll records also reveal that employee Carlos Dudley, who was left off the list, was hired by Respondent on March 21 and left its employ on July 26.

quickly received a raise to $8 an hour, and thereafter to $8.75 was hired in December 2000, and remained in Respondent's employ at the time of the hearing.[7]

Concerning Respondent's contention that it hires employees whose pay history indicates that they would be willing to work for $6 an hour at the time Urquhart applied, and $7 at the time of the hearing, the General Counsel argues that Respondent has hired a number of employees whose applications showed that, at their most recent job, they had been earning more than the Respondent's starting wage. In this regard, Respondent's records reveal that during the period of December 1999 through January 2001 Respondent hired at least 10 employees whose wage history at their most recent employer showed that they had been earning a higher rate than the Respondent was offering.[8]

The General Counsel also contends, in his brief, using mapquest.com that certain employees hired by Respondent, during the relevant time period, had to commute distances to Respondent's facility. The General Counsel asserts that Urquhart's residence is 91.2 miles from Respondent's facility, but that successful applicants Joshua Steinman lived 27.1 miles away and was hired in December 1999; Carton Smith lived 30.3 miles away and was hired in August 2000; and Steven Taylor lived 35.9 miles away and was hired in October 2000.

1. Respondent's position in its posthearing brief

Respondent's posthearing brief was written by P. Kester, she states therein that:

> Please take note that when I first glanced at his (Urquhart's) application I didn't understand why a man who currently held a job as a union insulator with so many years of experience, earning $20.44 an hour, was asking for an "insulator trainee" position (exhibit GC 14) I felt he wasn't looking for a job with us, especially after I told him we were not a union shop, but rather that he was here to promote the union company for which he worked. With that in my mind we never had an 'interview.' [R. Br. at 2.]
>
> . . . .
>
> On page 7 of the tapes transcript [Exhs. 15/16/17] I believe that confirms that my understanding was that a union worker isn't able to work for a non union (open shop) and on page 9 of same I'm still understanding at the top of the page) that he's here to "promote the unions." As a result of that his application wasn't taken as a serious gesture of looking for a job. I even tell him that on the top of page 17 of the transcript…[R. Br. at 3.]
>
> . . . .
>
> After a July 28, 2000 telephone conversation between Mr. Urquhart and Patricia Kester it became clear that he was serious about being considered for employment with Colden Hills, Inc.,
>
> At that time Mr. Earl Kester and I reviewed his application together and deemed him overqualified for our position. Distance and finances were also taken into consideration in making that decision. [R. Br. at 1-2.]

B. Analysis and Conclusions

In *Ferguson Electric Co.*, 330 NLRB 514 (2000), enfd. 242 F.3d 426 (2d Cir. 2001), the Board citing *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995), held that an individual's status as a paid full-time union organizer does not deprive him of protection of the Act, and that "Employment applicants are 'employees' within the meaning of Section 2(3)of the Act, even if they are paid by a union to organize their prospective employer." In *Wayne Erecting, Inc.*, 333 NLRB 1212 (2001), the Board, relying on its decision in *FES*, 331 NLRB 9 (2000), set forth the following framework for analysis of both refusal-to-hire and refusal-to-consider allegations. The Board stated in *Wayne Erecting, Inc.*, supra, slip op. at 1 that:

> In order to establish a discriminatory refusal-to-consider violation under the FES framework, the General Counsel must show:
>
> (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicant for employment.
>
> In order to establish a discriminatory refusal-to-hire violation, the General Counsel must establish the following elements:
>
> (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once the General Counsel has met his initial burden for the refusal to consider and refusal to hire, respectively, the burden shifts to the respondent to show that it would not have considered or hired, respectively, the applicants even in the absence of their union activity or affiliation. [Citations omitted.]

I have concluded that Respondent violated Section 8(a)(3) and (1) of the Act because it refused to consider Urquhart's application because of his status as a union organizer and because of his announced intent, during his interview, to organize Respondent's employees once he was hired. The transcript to Urquhart's February 17 interview with P. Kester revealed that she harbored animus towards his union status. When first viewing Urquhart's application, P. Kester asked if the high wages with respect to one of his past employers signified that the prior employer was a union operation. When Urquhart responded that it was, P. Kester promptly stated that Respon-

[7] Respondent's payroll records for 1999 reveal a similar pattern. There were 12 employees hired in 1999, but only 5 of them were on Respondent's payroll in 2000. Moreover, seven of the employees hired in 1999 were on the Respondent's payroll for less than 3 months.

[8] The applications of the following employees showed that they were earning the following hourly rates at their most recent employers before accepting employment with Respondent during the relevant time period: J. Steinman— $9.50; K. Wroblewski—$9.50; P. Prentice—$8.50; D. Neyman II—$10; C. Smith—$8; L. McKinney—$9.85; D. Wiley—$8.50; J. Woods—$10; K. Mallory—$9; and D. Yaskow—$8.50.

dent was nonunion. P. Kester also told Urquhart during the interview that one of the cons of unions was that their high wages had chased them out of the Buffalo area. She asked Urquhart what the union wage rates were and his response revealed that they started at $4 an hour more than Respondent was paying its employees. Moreover, the transcript of the interview reveals that P. Kester told Urquhart that she did not believe that as "a regular union worker you'd even be able to work for our firm, 'cause usually, you're union, you can't work — . . . for a company that's not union, from what I understand." In *Arlington Electric Inc.*, 332 NLRB 845 (2000), the Board held that the respondent employer violated Section 8(a)(1) of the Act when a supervisor asked an employee if he was the person mentioned in a union flyer, "and how he could be working a nonunion job as a union member." The Board held that:

> Through its questioning, the Respondent acknowledged that it was aware of Svetlick's union activity and implied that he should not be working for the Respondent. Thus, we find that a reasonable employee would find the questioning coercive. Id. at 1.

I have concluded that, as in *Arlington Electric*, id., P. Kester's remarks to Urquhart were violative of Section 8(a)(1) of the Act in that they were coercive because she implied that he should not be working for Respondent due to his union status. Similarly, I have concluded that P. Kester's statement to Urquhart during their July 28 phone call that she did not know whether she took his application seriously or that he was just there as a union organizer to be coercive and violative of Section 8(a)(1) of the Act.[9] First, during their February 17 interview, Urquhart gave no indication that he was not a serious applicant. He was on time for his interview, traveled a long distance to apply, stated that he was willing to travel, and that he was willing to work at Respondent's wage rates. Moreover, he told P. Kester that it was his job as a union organizer to work for nonunion contractors and to put in a good day's work. Accordingly, I have concluded that P. Kester, through her testimony and statements to Urquhart, revealed she refused to consider his application because he is a union organizer and that by engaging in such conduct Respondent violated Section 8(a)(3) and (1) of the Act.

I have also concluded by applying the standards set forth by the Board in *Wayne Erecting, Inc.*, supra, that Respondent refused to hire Urquhart because of his union status in violation of Section 8(a)(3) and (1) of the Act. First, the evidence establishes that Respondent was hiring at the time Urquhart applied on February 17. Urquhart obtained Respondent's listing through the New York State Unemployment Office, and Respondent's records reveal that it hired numerous employees after he applied, most of whom only worked for the company a short time and either quit or were terminated. Respondent ran a newspaper ad in July seeking insulator employees, and when Urquhart called P. Kester on July 28, she told him that they had hired since his interview and continued to hire.

There is also no contention by Respondent that Urquhart did not have the skills necessary to perform the work. Rather, P. Kester testified that she considered him overqualified as a reason Respondent refused to hire him. I find this contention to be pretextual. The tape of the February 17 interview reveals that P. Kester reviewed Urquhart's application and saw that he had extensive experience as insulator, and that his wage history was above Respondent's rates. Yet, she continued the interview and asked him if he would be willing to start at $6 an hour and she stated that his wage rate could change since Urquhart had insulation experience. When Urquhart said that he would be willing to start at $6 an hour, P. Kester wrote that figure on his application, and told him that he would have to sign something that he had been told of the $6 an hour rate. The interview continued and it was only when Urquhart informed her that he was a union organizer that P. Kester discounted his application. Moreover, Urquhart, who had extensive experience as an insulator, renewed his application with Respondent with his July phone call. However, when Respondent needed an experienced employee in October it hired an individual named Taylor, whose application reflected that he also had a long commute to work for Respondent, he had a relatively high wage history, his main background was that of a carpenter, and he had been fired from a recent job. Yet, Urquhart's application was ignored although he had told P. Kester he would remain employed with the Union while he worked for Respondent, which in effect would allow him to work for Respondent for low wages.

I also view Respondent's claim that Urquhart's high wage history and his commute prevented him from being hired by Respondent as disingenuous. As set forth above, Respondent's records show that it regularly hired applicants who have a higher wage history than that which Respondent starts it employees and it has also hired employees who live a distance away. I have concluded that P. Kester's claim that she had a concern that since Urquhart was overqualified, had a high wage history, and a commute that he would not be happy working for Respondent and would leave to be a pretext. First, she testified that Respondent hires numerous applicants and that many did not work out. In other words, Respondent was aware that its working conditions created high turnover. Thus, I do not find that Respondent was overly concerned with applicant turnover or over the cost of training. Most of the applicants Respondent hired were inexperienced and required training as insulators. On the other hand, since Urquhart was "overqualified" he would not require the training time of other applicants to be a productive employee. Furthermore, Urquhart informed P. Kester that he would remain employed by the Union while working for Respondent, thereby undercutting any serious concern that he could not afford the commute or to work at Respondent's wages. Accordingly, I have concluded the reasons advanced by Respondent for failing to hire Urquhart were pretextual and Respondent has not met its burden of showing that it would not have hired Urquhart in the absence of his union ac-

[9] While these comments were not specifically alleged as violative of the Act in the complaint, the content of both conversations was fully litigated and is closely related to the subject matter of the complaint. See *Gallup Inc.*, 334 NLRB 366 (2001); *Marshall Durban Poultry Co.*, 310 NLRB 68, fn. 1, enfd. in relevant part 39 F.3d 1312 (5th Cir. 1994); and *Monroe Auto Equipment Co.*, 230 NLRB 742, 751 (1977), where violations were found for matters not specifically alleged in the complaint but that were fully litigated.

tivity. I, therefore, find Respondent violated Section 8(a)(3) and (1) of the Act by failing to hire Urquhart since February 17.

CONCLUSIONS OF LAW

1. By informing an applicant that as a union worker he would not be able to work for Respondent because he could not work for a company that was not union Respondent violated Section 8(a)(1) of the Act.

2. By informing an applicant that his application was not taken seriously because he was a union organizer Respondent violated Section 8(a)(1) of the Act.

3. By refusing to consider for employment and refusing to hire applicant Bryan Urquhart because of his union affiliation and activities, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices. I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act. I shall also recommend that the Respondent be ordered to offer Bryan Urquhart employment in the position which he sought to apply without prejudice to his seniority or other rights or privileges he would have enjoyed had he been hired, and make him whole for any loss he would have suffered as a result of Respondent's refusal to hire and to consider him for hire in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Colden Hills, Inc., Buffalo, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing applicants that as a union worker they cannot work for Respondent because they cannot work for a nonunion company.

(b) Informing applicants that their application for employment was not taken seriously because they are union organizers.

(c) Refusing to consider for employment and refusing to hire job applicants because of their union affiliation and activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Bryan Urquhart employment in the position for which he sought to apply without prejudice to his seniority or other rights or privileges to which he would have been entitled absent the discrimination against him.

(b) Within 14 days from the date of the Board's Order, make Bryan Urquhart whole for any loss of earnings he may have suffered by reason of the discrimination against him as set forth in the remedy section of this decision.

(c) Within 14 days of the Board's Order, remove from its files any reference to the unlawful refusal to employ Bryan Urquhart and within 3 days thereafter, notify him in writing that this has been done and that this personnel action will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records and reports, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Buffalo, New York, and at all its current jobsites copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 17, 2000.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals enforcing an Order of the National Labor Relations Board."